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No. 84-720

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

GEORGE DEUKMEJIAN, Governor of the State of California, *et al.*,

Appellants,

vs.

NATIONAL MEAT ASSOCIATION, AMERICAN MEAT INSTITUTE, *et al.*,

Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

APPELLEES' MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Whether the California Beef Council Law violates the Commerce Clause by imposing an assessment on out-of-state beef processors without imposing a similar assessment on in-state beef processors.

2. Whether the California Beef Council Law violates the Commerce Clause by imposing an assessment on out-of-state beef processors who have no nexus with California and who do nothing more than ship out-of-state beef into California by common carrier.

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On Appeal from the United States Court of Appeals for the Ninth Circuit

APPELLEES' MOTION TO DISMISS OR AFFIRM

Appellees move to dismiss or affirm the judgment of the United States Court of Appeals for the Ninth Circuit on the ground that the judgment below is clearly correct and the case raises no issues of sufficient significance to warrant plenary consideration by this Court.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is not yet reported. (It is set forth at J.S.

App.* 1-16.) The opinion of the district court is reported at 562 F. Supp. 357 (J.S. App. 17-32).

JURISDICTION

The judgment of the Ninth Circuit holding parts of the California Beef Council Law unconstitutional was entered on September 21, 1984 (J.S. App. 1). Timely notice of appeal was filed on October 5, 1984 (J.S. App. 36). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 8, Clause 3, of the United States Constitution provides as follows:

> The Congress shall have power . . . to regulate commerce . . . among the several States . . . .

2. The pertinent provisions of the California Beef Council Law are contained in an appendix hereto (App. 1-20).

STATEMENT OF FACTS

Since 1956, California has imposed an assessment on the local sale of live cattle. The funds thus generated are used to finance the activities of the California Beef Council, a kind of state-sponsored trade association, devoted to promoting consumption of beef in California through billboards, television ads, point-of-sale fliers at supermarkets, etc. Cal. Food & Agricultural Code (CFAC) §§ 64501-64736.

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*J.S. App. refers to the appendix to the Jurisdictional Statement. The appendix attached to the instant motion is referred to as "App.".

In 1982, the amount of the assessment on the sale of live cattle was increased to $1.00 per head. The legislature was concerned, however, that Beef Council expenditures were benefiting out-of-state beef processors who provided sixty percent of the beef consumed in California but who did not contribute any funds to the Beef Council (Stip. #27). Therefore, at the same time it increased the assessment on the local sale of live cattle, the legislature imposed an assessment on the importation of processed beef into California (CFAC § 64713; App. 8-9).

The assessment on out-of-state beef processors is triggered by the importation of the processed beef into the state. The assessment is imposed on "out-of-state beef processors" who "ship" processed beef into California (CFAC § 64711; App. 8). The assessment is, in effect, a state tariff. No assessment is imposed on California beef processors. The assessment on out-of-state beef processors, it is argued, is a compensatory assessment to make up for the $1.00 per head assessment imposed on sellers of live cattle in California.

Within a month after the assessment on out-of-state beef processors was enacted on February 1, 1982, appellees brought this suit charging discrimination on a number of grounds. In direct response to this suit, the legislature amended the statute by reducing the assessment on out-of-state beef by 25% and by providing in general terms that the assessment on out-of-state beef (which is expressed in mils per pound) cannot exceed the equivalent of $1.00 per head — the assessment imposed on the local sale of live cattle.

Appellees claimed that the California statute, even as amended, violated the Commerce Clause because it discriminated against out-of-state beef processors. Appellees also argued that the statute violated the Commerce Clause

because there was no nexus between the State of California and out-of-state beef processors who did nothing more than ship processed beef into California by common carrier.

On cross-motions for summary judgment, the district court ruled for appellants. A unanimous panel of the Court of Appeals for the Ninth Circuit reversed on the ground that the statute discriminated against out-of-state beef processors in violation of the Commerce Clause. The court of appeals did not reach the nexus issue. California has appealed.

REASONS FOR GRANTING THE MOTION TO DISMISS OR AFFIRM

I

THIS CASE RAISES NO SUBSTANTIAL FEDERAL QUESTION SINCE, IN FINDING DISCRIMINATION IN VIOLATION OF THE COMMERCE CLAUSE, THE COURT OF APPEALS APPLIED LONG-STANDING PRINCIPLES RECENTLY REITERATED BY THIS COURT.

It is a truism that every Commerce Clause case turns on its own facts[1] Nevertheless, this Court has provided beacons that clearly light the way in many cases. In the final days of the last term, this Court lit two such beacons that plainly direct decision in this case: *Armco, Inc.* v. *Hardesty,* 467 U.S. ____, 81 L.Ed.2d 540 (June 12, 1984); *Bacchus Imports* v. *Dias,* 468 U.S. ____, 82 L.Ed.2d 200 (June 29, 1984). In the case at bar, the court below follow-

[1]As the court below stated, "This balancing of interests requires careful analysis of the facts of each individual case. . . .Thus, every commerce clause challenge turns upon the specific facts presented." (App. 6-7; *See also Westinghouse Electric Corp.* v. *Tully,* 52 U.S.L.W. 4485, 4489 (U.S. April 24, 1984) (quoting *Boston Stock Exchange,* 429 U.S. at 329, which in turn quotes *Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U.S. 450, 457 (1959).)

ed these signals from this Court. Unless this Court believes that the Ninth Circuit misunderstood these cases, or unless this Court believes that it should fully review every Commerce Clause case alleging discrimination, there is no reason to give plenary consideration to the case at bar.

The *Armco* case presents a factual setting closer to the instant case than any case in all Supreme Court literature. In *Armco,* the Court struck down a West Virginia statute that imposed a gross receipts tax on the sale of tangible personal property at wholesale. The statute provided that goods manufactured in the state, however, were exempt from the tax. Thus, like the California statute under consideration here, the West Virginia tax presented a facial discrimination against goods manufactured outside the state. West Virginia justified this discrimination by claiming that an even heavier tax — a manufacturing tax — had already been paid on locally manufactured goods. This is almost identical to California's claim here that no assessment is imposed on in-state beef processors because an assessment has been paid on the sale of cattle in California prior to slaughter.

The West Virginia Supreme Court upheld the taxing scheme. This Court reversed. Not surprisingly, in their Jurisdictional Statement, appellants relegate *Armco* to a footnote (J.S. 13, n.5).

In striking down the West Virginia gross receipts tax, this Court stated:

> The tax provides that two companies selling tangible property at wholesale in West Virginia will be treated differently depending on whether the taxpayer conducts manufacturing in the State or out of it. Thus, if the property was manufactured in the State, no tax on the sale is imposed. If the property was manufactured out of the

> State and imported for sale, a tax of 0.27% is imposed on the sale price.

467 U.S. at ____, 81 L.Ed.2d at 545.

To the argument that the gross receipts tax was simply a compensatory tax already imposed on local manufacturers by means of the manufacturing tax, this Court responded:

> [M]anufacturing and wholesaling are not "substantially equivalent events" such that the heavy tax on in-state manufacturers can be said to compensate for the admittedly lighter burden placed on wholesalers from out of state.

467 U.S. at ____, 81 L.Ed.2d at 545.

In the same way, selling live cattle in California and shipping processed beef into California "are not substantially equivalent events." Indeed, the cattle raising industry and the beef processing industry are quite distinct. And this distinction is critically important because it highlights the fact that cattle sellers and beef procesors do not compete with each other. Cattle sellers sell live animals; beef processors sell processed beef. Live animals are purchased by beef processors. Processed beef, on the other hand, is sold to other processors, wholesalers or retailers. Live animals are customarily sold at auction (or occasionally by private treaty). Processed beef, by contrast, is sold by daily telephone negotiation between buyer and seller. Thus, the sellers, the buyers, the products and the channels of trade are all different in the cattle producing industry and the beef processing industry. It is impossible to "compensate" for an assessment on out-of-state beef processors by imposing an assesment on the sale of local live cattle; it is impossible for the simple reason that cattle producers and beef processors do not compete with each other. And, as this Court's decisions have made clear, the Commerce

Clause demands "equality for the purposes of competition." *Halliburton Oil Well Co.* v. *Reily,* 373 U.S. 64, 70 (1963)[2]

In the case at bar, California argues that the court below should have looked at the practical effect of this facially discriminatory assessment on out-of-state beef processors. Had the court done this, California argues, it would have found that the assessment was not discriminatory because the economically powerful beef processors could "pass back" the assessment by paying less for the cattle they purchased from economically weak cattle producers.[3]

[2]In the court below, the appellants erroneously placed heavy reliance on this Court's decision in *Alaska* v. *Arctic Maid,* 366 U.S. 199 (1961), as the court of appeals' decision makes clear (J.S. App. 12). In their Jurisdictional Statement, however, appellants fail even to cite *Arctic Maid.* The reason is obvious: The Ninth Circuit distinguished *Arctic Maid* on the ground that there this Court upheld a compensatory tax despite the fact that it was imposed on different businesses but only because "the different businesses were direct competitors" (J.S. App. 13). In short, *Arctic Maid* emphasizes that whether a tax or assessment is imposed on "substantially equivalent events" *must* be determined by reference to whether the parties are competing with one another. This fact is devastating to appellants' case here because, as even appellants must recognize, out-of-state beef processors do not *compete* with local cattle sellers.

[3]We assume, *arguendo,* that all out-of-state beef processors could pass-back the amount of the assessment to the cattle producers from whom they purchased cattle. In fact, that is inherently incredible. The price of cattle, like other prices in a free market, is determined by supply and demand. That price is fixed without regard to the purchaser's cost of marketing the beef. Regardless of the relative economic strength of the cattle producer and the beef processor, the beef processor does not pay less for the cattle simply because he must pay an assessment when he imports the processed beef into California. If the beef processor could do this, he could just as easily "pass-back" an increase in labor rates, energy costs, plant modernization, etc. — an obvious impossibility. By the operation of the laws of supply and demand, a cattle producer will not sell his cattle for a dollar less than he has to, regardless of whether California imposes an assessment on out-of-state beef processors. Neither will the beef processor pay a

The Ninth Circuit effectively answered this argument:

> [w]e are not aware of any decision in which a discriminatory tax has been upheld on the ground that the payor had the ability to shift the incident of the tax. Such a holding would permit a state to discriminate against any out-of-state seller who was powerful enough to extract favorable concessions from its suppliers. Moreover, the constitutionality of such a scheme could fluctuate as a function of market conditions.

J.S. App. 11.

This is in conformity with *Armco,* in which this Court rejected a contention that would make the constitutionality of the West Virginia statute "depend on the shifting complexities of the tax codes of 49 other States" (467 U.S. at ____, 81 L.Ed.2d at 547). This Court also refused to permit the validity of the statute "depend on the particular other States in which it operated." *Id.*

In *Armco,* this Court quoted approvingly from *Freeman* v. *Hewit,* 329 U.S. 249 (1946):

> The immunities implicit in the Commerce Clause and the potential taxing power of a State can hardly be made to depend, in the world of practical affairs, on the shifting incidence of the varying tax laws of the various States at a particular moment. Courts are not possessed of instru-

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dollar more for the cattle than he has to. Just because California imposes an assessment on imported processed beef, the beef processor cannot arbitrarily pay less to the cattle producer, especially because California processors (who do not have to pay the assessment imposed on out-of-state beef processors) could out-bid the out-of-state beef processor.

> ments of determination so delicate as to enable them to weigh the various factors in a complicated economic setting which, as to an isolated application of a State tax, might mitigate the obvious burden generally created by a direct tax on commerce.

Armco, Inc. v *Hardesty,* 467 U.S. at ____, 81 L.Ed.2d at 547, n. 8, quoting *Freeman* v. *Hewit,* 329 U.S. at 256.

Based on this language from *Armco,* the court below stated:

> In *Armco, Inc.* v. *Hardesty,* 52 U.S.L.W. 4787, 4789 n.8 (U.S. June 12, 1984), the Supreme Court held that a state tax could not be upheld on the basis of economic factors that might somehow mitigate its direct burden on interstate commerce.

J.S. App. 10.

The Ninth Circuit's rejection of the appellants' passback argument demonstrates that the court below did not rely simply on the statute's facial discrimination. In their Jurisdictional Statement, appellants incorrectly accuse the court below of adopting a rigid per se rule that "disregarded all economic evidence" (J.S. 9). In fact, the court below specifically ruled that "facial discrimination, however, is *not* the decisive factor" (J.S. App. 7; emphasis supplied). And, in fact, the court below did consider appellants' economic evidence but, to appellants' chagrin, did not find it persuasive.

In *Armco,* this Court noted that the dangers of double taxation were also present. If another state imposed a tax on manufacturing, a second tax would have to be paid if the manufactured goods were sold in West Virginia. In this Court's words:

> If Ohio or any of the other 48 States imposes a like tax on its manufacturers — which they have every right to do — then Armco and others from out of state will pay both a manufacturing tax and a wholesale tax while sellers resident in West Virginia will pay only the manufacturing tax.

467 U.S. at ____, 81 L.Ed.2d at 546.

What this Court in *Armco* considered a possibility is, in the instant case, a reality. For the record shows that at least nine states[4] impose head fees similar to that imposed on the sale of live cattle in California. (Supplemental Excerpt of Record 14; Answer to Defendants' Interrogatory 5.) In reality, under California's pass-back theory, the real victim of the discrimination would be the out-of-state cattle producer in a state which imposes a head assessment. Such a producer would pay the California assessment (by way of the theoretical pass-back) *and,* in addition, the assessment imposed by his own state.[5] Consequently, appellants' contention that the assessment scheme produces equality between out-of-state cattle producers who com-

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[4]Arizona, Colorado, Idaho, Iowa, Minnesota, Nevada, Oregon, Utah, and Washington. None of these states imposes an assessment on beef shipped in from other states; only California does so at this time.

[5]This effectively distinguishes this case from the sales tax/use tax cases where a use tax is imposed on all users within the state regardless of whether the item was purchased in-state or out-of-state. In these cases, a credit is allowed for any previously paid sales tax on the item, regardless of whether the sales tax was paid on an in-state or out-of-state sale. See *Henneford* v. *Silas Mason Co.*, 300 U.S. 577, 583-584 (1937). Moreover, the complementary use tax/sales tax is effectively imposed on competitors: Retailers of the same goods, whether local or out-of-stae, collect either a sales tax or a use tax on the sale of those goods.

pete directly with California producers (J.S. 7) is without merit[6]

Bacchus Imports v. *Dias,* 468 U.S. ____, 82 L.Ed.2d 200 (June 29, 1984) presents a factual situation in many respects similar to *Armco* (and likewise to the case at bar). In *Bacchus,* Hawaii imposed a 20% excise tax on local liquor sales at wholesale but exempted sales of *okolehao* (a brandy distilled from a shrub indigenous to Hawaii) and pineapple wine. The Hawaii Supreme Court noted that *okolehao* and pineapple wine are produced only in Hawaii. The Hawaii Supreme Court upheld the statute on the ground that "the ultimate burden [of the tax] is borne by consumers in Hawaii." *In re Bacchus Imports, Ltd.,* 65 Hawaii ____, 656 P.2d 724, 734 (1982). The Hawaii Su-

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[6]Appellees' case here is even stronger than the plaintiff's case in *Armco.* In *Armco,* the plaintiff was also the manufacturer. Here, the appellee beef processors are *not* the cattle producers who pay the head fee. The cattle producers comprise another industry. Appellees here buy from the cattle producers.

In this connection, Justice Rehnquist dissented in *Armco* because he believed that the taxpayer's argument rested on a hypothetical double burden that it might face *if* another state levied a tax on manufacturing. For Justice Rehnquist, the challenged tax would be unconstitutional only if it could be shown that the taxes paid by out-of-state wholesalers *"on the same goods"* were higher than the the taxes paid by in-state manufacturers by virtue of a manufacturing tax imposed outside West Virginia (467 U.S. at ____, 81 L. Ed.2d at 548; emphasis added). Justice Rehnquist concluded that "at the wholesale level *at which appellant competes* with in-state manufacturers," the taxpayer could show no double taxation and, therefore, no unconstitutional discrimination (*Id.*; emphasis added).

In the instant case, the discrimination has been shown; it is actual, not hypothetical: At the level of competition at which appellees here compete with California beef processors, *i.e.,* the sale of processed beef, the assessment on out-of-state processors is higher. For no assessment is imposed on the California sellers of the same goods. California does not — and cannot — dispute this.

preme Court, in effect, accepted a "pass-forward" argument, similar to the pass-back argument appellants make here. The Hawaii Supreme Court reasoned that the excise tax was not discriminatory because the wholesalers passed it forward to the consumer. This Court reversed and stated:

> The wholesalers are, however, liable for the tax. Although they may pass it on to their customers, and attempt to do so, they must return the tax to the State whether or not their customers pay their bills.
>
> * * *
>
> [T]he Hawaii Supreme Court erred in concluding that there was no improper discrimination against interstate commerce merely because the burden of the tax was borne by consumers in Hawaii.

468 U.S. at ____, 82 L.Ed.2d at 207, 210.

In the same way in the case at bar, the out-of-state meat processor must pay the assessment whether or not he is able to pass-back the assessment to suppliers of cattle.

In *Bacchus,* this Court specifically rejected an argument which would permit a discriminatory imposition on an economically powerful industry because it could shift the burden:

> [W]e perceive no principle of Commerce Clause jurisprudence supporting a distinction between thriving and struggling enterprises under these circumstances, and the State cites no authority for its proposed distinction.
>
> * * *
>
> [T]he propriety of economic protectionism may not be allowed to hinge upon the State's — or

> this Court's — characterization of the industry as either "thriving" or "struggling."

468 U.S. at ____, 82 L.Ed.2d at 210.

In rejecting the pass-back theory, the court below specifically relied on this Court's decision in *Bacchus:*

> Our conclusion [rejecting the pass-back theory] is supported by the Supreme Court's decision in *Bacchus Imports, Ltd.*, ____ U.S. ____, 104 S.Ct. 3049, 3054 (1984). In *Bacchus Imports,* the state argued that liquor wholesalers lacked standing to attack the constitutionality of a discriminatory tax because they could shift the burden of the tax to their customers. The Supreme Court found that the cost-shifting theory did not affect the wholesaler's standing — (1) expressing doubt that wholesalers could actually pass on the tax, and (2) finding standing even if the burden could be shifted.

J.S. App. 11.

In *Bacchus,* Hawaii also argued that the discriminatory effect was slight, so it should be ignored. Appellants make the same argument here. The argument was rejected in *Bacchus,* as it must be here. This Court stated:

> It is well settled that "[w]e need not know how unequal the Tax is before concluding that it unconstitutionally discriminates." *Maryland* v. *Louisiana,* 451 U.S. 725, 760 (1981).[7,8]

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[7]California argues that it "should not be held to the more rigid standard applied" by this Court in *Bacchus* (J.S. 11). The state argues that *Bacchus* was a "conventional tax case," while the case at bar involves an assessment. If anything, an even more rigid standard should be applied in assessment cases because the state is not imposing the assessment for general governmental uses but rather to promote a product manufactured by a particular group. The balancing which is required by what California refers to as the "more rigid standard" is

468 U.S. at ____, 82 L.Ed.2d at 208.

Neither *Armco* nor *Bacchus* broke new ground. The principles this Court applied were plainly marked by precedent. See, *e.g., Maryland* v. *Louisiana,* 451 U.S. 725 (1981); *Philadelphia* v. *New Jersey,* 437 U.S. 617 (1978); *Boston Stock Exchange* v. *State Tax Commission,* 429 U.S. 318 (1977); *Halliburton Oil Well Cementing Co.* v. *Reily,* 373 U.S. 64 (1962); *Northwestern States Portland*

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necessitated by the state's need to exercise its taxing powers. *Boston Stock Exchange* v. *State Tax Commission,* 429 U.S. 318, 329 (1977). Recent strains on state treasuries have required the states to find new sources of revenues and this court has been sensitive to those needs. *See Michigan-Wisconsin Pipeline Co.* v. *Calvert,* 347 U.S. 157, 166 (1954). As Mr. Justice Frankfurter has written: "As pressures for new revenues become more and more insistent, ways and means of meeting them present to a state not only the baffling task of tapping fresh sources of revenue but of doing so with due regard to a state's existing taxing system." *Wisconsin* v. *J.C. Penney,* 311 U.S. 435, 442 (1941). These pressures, however, are absent in the case at bar. This is *not* a case in which a state government is seeking to tap a new source for its general revenues. On the contrary, here the state seeks simply to assist its local cattle industry by establishing a state-sanctioned trade association.

[8]Appellants also argue that this discriminatory assessment may be imposed because California has no alternative way of compensating for the head fee imposed on the sale of local live cattle. It is true that California cannot tax the sale of out-of-state cattle, regardless of whether the beef from these cattle eventually finds its way to California. What California can do, however, as the court below pointed out, is tax the sale of processed beef, regardless of where it is processed, so long as it is sold in California. As the court below stated:

> California could shift the in-state assessment from cattle producers to beef processors and tax in-state and out-of-state beef processors equally. We recognize that this change would eliminate multiple taxes potentially available on a single animal because a head fee is charged every time a sale occurs. But the assessment could be adjusted to compensate for this loss. In short, it appears that less discriminatory means appear to be available (J.S. App. 15).

Cement Co., v. *Minneapolis,* 358 U.S. 450 (1959); *Michigan-Wisconsin Pipeline Co.* v. *Calvert,* 347 U.S. 157 (1954); *Best & Co.* v. *Maxwell,* 311 U.S. 454 (1940); *Baldwin* v. *G.A.F. Seelig, Inc.,* 294 U.S. 511 (1935).[9] It is unnecessary to rehearse these cases in light of the clear holdings in *Armco* and *Bacchus.* In reviewing this literature, however, one gets the clear impression that this Court gave plenary consideration in *Armco* and *Bacchus* only because the lower court decisions so clearly deviated from the thrust of this precedent and, therefore, plainly required reversal. In the case at bar, however, the court below was guided not only by this early precedent, but also by *Armco* and *Bacchus,* which it followed.[10] Thus, there is no occasion to accord this case plenary review.

II

THIS CASE RAISES NO SUBSTANTIAL FEDERAL QUESTION PERTAINING TO NEXUS UNDER THE COMMERCE CLAUSE SINCE THE COURT OF APPEALS DID NOT REACH THIS ISSUE AND, MOREOVER, THIS COURT HAS REJECTED APPELLANTS' "BENEFITS CONFERRED" THEORY OF NEXUS.

Taking its cue from this Court in *Armco,* the court below based its decision on the discrimination issue, rather than the nexus issue, which it found unnecessary to de-

[9]Appellants argue that "This Court's tax decisions are not wholly apposite here" (J.S. 18) and that these cases "provide only an imperfect analogy here" (J.S. 18). Appellants seek to distinguish these cases on the ground that they involve taxes while the case at bar involves assessment. For purposes of this issue, this is a distinction without a difference. *See* n. 8, *supra.*

[10]The court below stated: "In light of recent Supreme Court Commerce Clause precedent, *e.g., Bacchus Imports* v. *Dias,* 52 U.S.L.W. 4979 (U.S. June 29, 1984); *Armco, Inc.* v. *Hardesty,* 52 U.S.L.W. 4787 (U.S. June 12, 1984), the California assessment on imported processed beef cannot stand." (J.S. App. 16)

cide.[11] Were its decision on discrimination to be reversed, the nexus issue would have to be faced.

As noted earlier, the challenged California assessment is triggered by the importation of out-of-state beef into California, effectively operating as a tariff. True, the assessment is not collected at the border, but the draconian collection procedure embodied in the California statute simply emphasizes the lack of nexus:

First, the statute requires every "out-of-state beef processor" to register with the Department of Food and Agriculture before offering any processed beef for sale "into" California (CFAC § 64717; App. 10).

Next, the statute requires the first California "handler" of such processed beef to provide the California Director of Food and Agriculture with a list of out-of-state beef processors from whom he has acquired processed beef. If the handler fails to provide the State with this list, the handler is subject to a penalty (CFAC § 64718; App. 10).

If out-of-state beef processors fail to pay the assessment, the Department of Food and Agriculture is to circulate a list containing the names of such out-of-state beef processors (CFAC § 64719(c); App. 10-11). This blacklist is circulated to all California beef handlers who are thus put on notice.

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[11]California argues, somewhat disingenuously, that the court below "impliedly upheld California's argument" regarding nexus (J.S. 25). The Ninth Circuit specifically stated, "We do not reach the nexus issue. *See Armco, Inc.* v. *Hardesty*, 52 U.S.L.W. 4787 (U.S. June 12, 1984) (Supreme Court does not reach nexus issue because it found West Virginia tax unconstitutionally discriminated against interstate commerce)." (J.S. App. 4-5)

If a California "handler" knowingly purchases beef from an out-of-state processor on the blacklist because he has not paid assessments, *the handler himself becomes liable for the assessment* (CFAC § 64719(d)(; App. 11). The California handler may avoid liability for the out-of-state beef processor's assessment by refusing to purchase processed beef from any out-of-state processor on the proscribed list.

In this way, California seeks to impose its economic will on out-of-state beef processors over whom it has no jurisdiction.

To close the circle, the California statute further provides that if a handler pays an assessment owed by the out-of-state beef processor, the handler may deduct the amount thereof from *any* sums owed by the handler to the out-of-state beef processor, regardless of the origin or basis of the debt (CFAC § 64721; App. 12).

Finally, to make clear that all out-of-state beef processors must pay the assessment, the statute creates a legal presumption that the State has jurisdiction over all out-of-state beef processors. (CFAC § 64722; App. 12).

The statute thus makes it clear that out-of-state beef processors must pay the assessment even though they do nothing more than consummate orders by telephone and ship processed beef into California by common carrier.

This Court has held that Maryland did not have jurisdictional nexus over a mail-order seller who sent promotional circulars into Maryland, advertised its wares in Maryland newspapers and on Maryland radio stations, and even delivered its merchandise to its Maryland customers with its own trucks and drivers. *Miller Bros. Co.* v. *Maryland*, 347 U.S. 340 (1954).

Similarly, in *National Bellas Hess, Inc.* v. *Department of Revenue of Illinois,* 386 U.S. 753 (1957), this Court held that Illinois could not impose an obligation to collect use taxes on a Missouri mail-order house that sent thousands of catalogs and fliers to its Illinois customers, aggressively courting customers in Illinois and sending millions of dollars of merchandise into Illinois.

These cases clearly require a ruling in appellees' favor on the nexus issue. Indeed, appellants recognize that under ordinary principles of nexus they must lose; they concede that "conventional 'nexus' is lacking" (J.S. 22, 24).

Appellants, therefore, argue the novel theory that California has nexus in this case because of the benefits conferred on out-of-state beef processors as a result of California Beef Council expenditures. This theory, however, was rejected in *National Bellas Hess.* The argument appellants urge here received perhaps its strongest exposition in the *dissent* in that case:

> There should be no doubt that this large-scale, systematic, continuous solicitation and exploitation of the Illinois consumer market is a sufficient "nexus" to require Bellas Hess to collect from Illinois customers and to remit the use tax, especially when coupled with the use of the credit resources of residents of Illinois, dependent as that mechanism is upon the State's banking and credit institutions.
>
> * * *
>
> Bellas Hess enjoys the benefits of, and profits from the facilities nurtured by, the State of Illinois as fully as if it were a retail store or maintained salesmen therein.

* * *

> Under the present arrangement, it conducts its substantial, regular, and systematic business in Illinois and the State demands only that it collect from its customer-users — and remit to the State — the use tax which is merely equal to the sales tax which resident mechants must collect and remit.

386 U.S. at 511-512.

The majority in *Bellas Hess,* however, rejected this argument and held that the benefits-conferred theory did not satisfy the constitutional requirement of nexus. If the benefits-conferred theory would not supply nexus to require *collection* of a use tax, surely it would not supply nexus to require *payment* of an assessment.

Appellants concede that they have no precedent for their novel theory. Instead, they seek to draw an analogy to the so-called user-fee cases in which a state may impose a reasonable fee on out-of-state users of state-owned transportation facilities to reasonably compensate the state for the cost thereof. *Evansville-Vanderburgh Airport Authority Dist.* v. *Delta Airlines, Inc.,* 405 U.S. 707 (1972); *Clyde Mallory Lines* v. *Alabama,* 296 U.S. 261 (1935); *Capitol Greyhound Lines* v. *Brice,* 339 U.S. 542 (1950). However, these cases have nothing to do with nexus. The issue was not even raised in those cases because the users were necessarily present in the state when they made use of the state's transportation facilities. The only question in these cases was whether the state was making a reasonable charge for the services provided. Appellants themselves concede that "the user fee cases are not wholly applicable here, because the assessee in each case was

physically present in the assessing state and the conventional 'nexus' requirement was therefore met (J.S. 23).[12]

CONCLUSION

For the foregoing reasons, appellees' motion to dismiss or affirm should be granted.

Respectfully submitted,

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November 30, 1984

[12]In the absence of any precedent to support their novel theory, appellants attempt to garner comfort from *Massachusetts* v. *United States*, 435 U.S. 444 (1978). This case did not involve a state assessment or tax; it involved an aircraft registration tax imposed under the Federal Airport Revenue Act of 1970. The issue was whether this federal tax violated the implied immunity of a state government from federal taxation; the court held that it did not. Nexus under the Commerce Clause was not an issue and the case has nothing to do either with nexus or with the Commerce Clause. Appellants' heavy reliance on the case demonstrates how far they must reach for an analogy.

APPENDIX

AMENDED IN SENATE JANUARY 11, 1982
AMENDED IN SENATE SEPTEMBER 13, 1981
AMENDED IN SENATE SEPTEMBER 10, 1981
AMENDED IN SENATE AUGUST 24, 1981
AMENDED IN SENATE, AUGUST 17, 1981
AMENDED IN ASSEMBLY JULY 6, 1981
AMENDED IN ASSEMBLY JUNE 15, 1981
AMENDED IN ASSEMBLY MAY 6, 1981

CALIFORNIA LEGISLATURE – 1981-82 REGULAR SESSION

ASSEMBLY BILL **No. 960**

Introduced by Assemblymen Hallett, Costa, Cramer, Herger, Johnston, Martinez, and Thurman
(Principal coauthors: Senators Johnson and Nielsen)
(Coauthors: Senators Alquist, Maddy; and Vuich)

March 16, 1981

An act to amend Sections *21702,* 64532, 64691, 64691.5, and 64691.7 of, to add Sections *21702.1, 64534, 64663, and 64691.8* to, to add and repeal Article 8.5 (commencing with Section 64710) of Chapter 2 of Division 22 of, and to repeal Section 64692 of, the Food and Agricultural Code, relating to cattle, making an appropriation therefor *and declaring the urgency thereof, to take effect immediately.*

LEGISLATIVE COUNSEL'S DIGEST

AB 960, as amended, Hallett. California Beef Council Law: fees.

(1) Existing law requires sellers of cattle, with specified exceptions, to pay a fee of $0.25 per head to the Director

of Food and Agriculture for support of the activities relating to the California Beef Council Law. A fee of greater than $0.25 per head may only be charged with the approval, by a referendum in specified amounts, of the cattle producers in the state.

This bill would increase the fee per head required to be paid for support of the activities relating to the California Beef Council Law to $1 and would exempt cattle or calves shipped into a California registered feed lot from out-of-state from this fee. The bill would also include any cattle slaughtered at a licensed slaughter plant among those cattle on which the fee per head need not be paid and would specify that these cattle shall be assessed as provided in (2) below.

(2) Existing law requires that the per head fee for support of the council be paid for each head of cattle which originates in any other state and which is slaughtered in this state.

This bill would repeal this provision and instead require that an assessment of $0.002 per pound based on chilled carcass weight, or $0.00233 per pound on boxed beef, *as defined,* or $0.00323 per pound in boned beef be collected from every out-of-state beef processsor, as defined. The first handler in California of beef received from outside the state would be required to submit a list to the director of the out-of-state beef processors from whom beef has been received and would be subject to a civil penalty of $50 per violation of this requirement. An equivalent assessment of $0.002 per pound based on estimated chilled carcass weight, as computed pursuant to a specified formula, would be charged and collected on all beef which is slaughtered in California and may be paid either by the slaughterer or the seller as agreed to between them. These

assessment provisions would remain in effect only until January 1, 1986, and as of that date would be repealed unless a later enacted statute deletes or extends that date.

The bill would also require every out-of-state beef processor, before selling or offering to sell beef in California, to register with the Department of Food and Agriculture in a form prescribed by the director and pay a fee as specified.

(3) The bill would require the first handler in California of beef received from outside the state to pay the assessments required in the act if the state does not have jurisdiction over an out-of-state beef processor for the purpose of collecting the assessment and other specified conditions are met.

(4) Existing law specifies permissible uses for funds raised for support of beef council activities.

This bill would permit the expenditure of beef council funds to conduct *cost-sharing* advertising with nonbeef brand name products.

(5) The bill would make an appropriation by increasing the amount of fees paid into a continuously appropriated fund.

(6) The bill would provide that, if any portion of the act or the application thereof to any person or circumstances is held invalid, the invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application.

(7) The act would take effect immediately as an urgency statute.

Vote: 2/3. Appropriation: yes. Fiscal committee: yes. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Section 21702 of the Food and Agricultural Code is amended to read:

21702. A person shall not buy, sell, or accept any animal, unless the seller or donor gives, and the buyer or donee receives, at the time of the delivery of the animal, a written bill of sale or written instrument from the owner or his agent which gives the number, kind, breed, and sex, and, if branded, the brand and location of the brand on each animal. *The bill of sale required by this section shall be made out in triplicate with one copy being mailed to the director within 30 days of the date of the sale.*

SEC. 1.5. Section 21702.1 is added to the Food and Agricultural Code, to read:

21702.1. Any person who sells or otherwise transfers title to any cattle or calves to another person shall remit to the director within 30 days of that sale, the beef council fees required under Section 64691, together with a copy of the bill of sale, unless these fees have been collected pursuant to a brand inspection as provided for in Section 64691.7.

SEC. 2. Section 64532 of the Food and Agricultural Code is amended to read:

64532. The purposes of this chapter are as follows:

(a) To enable the cattle industry, with the aid of the state, to develop, maintain, and expand the state, nationwide, and foreign markets for beef and beef products produced, processed, manufactured, sold, or distributed in this state, for human consumption, and the use and consumption of such beef and beef products in such markets.

(b) In aid, but not in limitation, of the purpose in subdivision (a), to authorize and enable the director to formulate and effectuate, directly or in cooperation with other agencies and instrumentalities which are specified in this chapter, sales stimulation and consumer, or other, educational programs designed to increase the use and consumption of beef and beef products for human consumption.

(c) To provide funds for the administration and enforcement of this chapter by mandatory fees to be collected in the manner which is prescribed in this chapter, unless producers elect to provide such funds through voluntary contributions pursuant to Article 7 (commencing with Section 64671).

SEC. 2.1. Section 64534 is added to the Food and Agricultural Code, to read:

64534. Any violation of any provision of this chapter is a misdemeanor.

SEC. 2.2. Section 64663 is added to the Food and Agricultural Code, to read:

64663. The council shall not extend beef council funds for the advertising of brand name beef products. The council may expend beef council funds to conduct cost-sharing advertising with nonbeef brand name products.

SEC. 3. Section 64691 of the Food and Agricultural Code is amended to read:

64691. In order to carry out the programs and administer the activities which are conducted pursuant to this chapter, except as specified in Section 64691.5, a fee of one dollar ($1) per head on cattle or calves, except cattle or calves shipped into a California regis-

tered feedlot from out of state, shall be charged and collected from the seller or from the seller's account and paid to the director as specified in Section 64691.7 by each operator of any stockyard, livestock auction market, slaughterhouse, packing plant, feedlot, or seller's agent, who shall deduct that amount from the proceeds of sale or from other moneys owed to the seller. The fee shall be charged on all cattle and calves, except the following:

(a) Hides, skins, or reduction animals.

(b) Any cattle that are transported for purposes other than for sale of slaughter and without a change of ownership.

(c) Any animal which is less than three months of age.

(d) Any animal sold for milk or calf production.

(e) Any cattle slaughtered at a licensed slaughter plant. These cattle shall be assessed pursuant to Article 8.5 (commencing with Section 64710).

The fees shall not be charged or collected more than once from each owner upon the same animal.

SEC. 4. Section 64691.5 of the Food and Agricultural Code is amended to read:

64691.5. A fee greater than one dollar ($1) per head on cattle and calves prescribed by Section 64691 shall not be charged pursuant to that section under a mandatory fee payment program, unless and until the greater fee is approved by the producers in this state, by a referendum to be submitted to the producers by the director. The director shall find that the producers have approved any greater fee, if he or she finds both of the following:

(a) That at least 40 percent of all producers, as determined from a list to be established by the director, have voted in the referendum.

(b) That at least 65 percent of total producers that produced not less than 51 percent of the volume of the commodity in the state, or at least 51 percent of the total producers that produced not less than 65 percent of the volume of the commodity in the state, voting in the referendum favor charging of the greater fee.

SEC. 5. Section 64691.7 of the Food and Agricultural Code is amended to read:

64691.7. The fees required under 64691 shall be due and payable at the same time that brand inspection fees are collected as provided in Article 9 (commencing with Section 21281) of Chapter 6 of Division 10, except for cattle shipped outside this state for immediate slaughter, without brand inspection fees, pursuant to Section 21292. The fees prescribed by this chapter on such cattle shall be due and payable, and are to be collected by the brand inspector when he inspects the cattle, prior to their shipment from this state.

SEC. 5.5. Section 64691.8 is added to the Food and Agricultural Code, to read:

64691.8 Where no brand inspection is required on the sale of cattle or calves in this state, it shall be the responsibility of the seller, as provided in Section 21702.1, to remit the fees required under Section 64691 to the director within 30 days of the date of that sale. Failure to comply shall subject each person or persons to the penalty provisions of Section 64693.

SEC. 6. Section 64692 of the Food and Agricultural Code is repealed.

SEC. 7. Article 8.5 (commencing with Section 64710) is added to Chapter 2 of Division 22 of the Food and Agricultural Code, to read:

Article 8.5. Assessment on Beef

64710. "Handler" means any person who, as owner, agent, or broker, purchases, or otherwise acquires from a producer, producer handler, another handler, or any out of state beef processor, possession or control of beef.

64711. "Out-of-state beef processor" means the last person, firm, or corporation who slaughters or otherwise processes any beef which is shipped into the state.

64712. For the purposes of this article, the term "beef" includes only carcass beef, boxed beef and boned beef in fresh or frozen form.

64712.5 "Boxed beef" means beef that is broken down or cut into primal and subprimal cuts, vacuum sealed in a barrier bag, and placed in a shipping carton for shipment to a customer.

64713. Except as otherwise provided in this article and in order to carry out the programs and administer the activities which are conducted pursuant to this chapter, an assessment of $0.002 per pound based on chilled carcass weight or $0.00233 per pound on boxed beef or $0.00323 per pound on boned beef shall be collected from every out-of-state beef processor. Payment shall be made directly to the department, toge-

ther with copies of each sales transaction of carcass, boxed, or boned beef shipped into California. Collections under this section shall be made by the department under regulations promulgated by the director. An equivalent assessment of $0.002 per pound based on estimated chilled carcass weight as computed pursuant to Section 64715 shall also be charged and collected on all beef which is slaughtered in this state. Payment of the assessment for cattle slaughtered in this state shall be the responsibility of the seller of the cattle to be slaughtered, but may be paid either by the slaughterer or the seller as agreed to between them.

64715. (a) In order to comply with the prompt payment requirements of the Packers and Stockyards Act, 1921 (7 U.S.C. Sec. 181, et seq.) and the laws of this state, assessments on beef slaughtered in California shall be made on the estimated chilled carcass weight computed as follows:

(1) Fed cattle and bulls: live weight x 0.610 = chilled carcass weight.

(2) Cows: live weight x 0.485 = chilled carcass weight.

(3) All calves and all nonfed cattle except cows: live weight x 0.560 = chilled carcass weight.

(b) For the purposes of this section, fed cattle shall include all cattle fed in a drylot for 60 days or more. Nonfed cattle shall include all other cattle except cows. Cows shall include all female cattle which have produced one or more calves and which are not fed cattle.

64716. Nothing in this article or any other provision of California law is intended to imply that cattle

feeders are processors of beef rather than producers of beef.

64717. In order to carry out the programs and administer the activities conducted pursuant to this article, every out-of-state beef processor, before selling or offering to sell beef into this state, shall register with the department in a form prescribed by the director.

The department may charge a fee for this registration in an amount necessary to cover the costs of registration.

64718. The first handler in this state of beef received from a point of origin outside of this state shall submit a list of all out-of-state beef processors from whom beef has been received every quarter pursuant to regulations promulgated by the director. A handler violating this provision is subject to a civil penalty, in an action brought by the director in the appropriate court in the county where the violation occurs, of fifty dollars ($50) for each violation.

64719. When it has been determined by a court of competent jurisdiction or through an official written opinion of the Attorney General that the state does not have jurisdiction for the purpose of collecting the assessments required in this article over an out-of-state beef processor, the first handler shall be subject to the assessment provided for in this article, only if all of the following duties and conditions are met, as well as those provided for in Section 64720:

(a) The written opinion of the Attorney General shall be delivered to and thoroughly reviewed by the director, and shall contain a determination that the

state does not have jurisdiction to collect the assessment provided for in this article.

(b) The Attorney General shall, by written report, notify the director whenever a court of competent jurisdiction has determined that the state does not have jurisdiction over an out-of-state beef processor for the purpose of collecting the assessments required in this article.

(c) The department shall compile and maintain a list of out-of-state beef processors who are not in compliance with the assessment payment requirements provided for in this article, and who additionally are not subject to the jurisdiction of this state for the purpose of paying the assessments required in this article.

The director shall send this list to all first handlers by certified mail, return receipt requested, postage prepaid, who submit the names of out-of-state beef processors pursuant to Section 64718. The list shall be continually updated by the department and furnished to first handlers on a quarterly basis and in the manner provided for in this subdivision.

(d) The first handler had actual knowledge that the name of the out-of-state beef processor from whom beef was purchased was on the list provided for in subdivision (c) at the time the purchase contract was entered into. Seven days after the list is mailed by the department in accordance with the procedures prescribed in subdivision (c), there shall be a presumption affecting the burden of producing evidence pursuant to Section 604 of the Evidence Code that the list has been received by the first handler and that the first handler had actual knowledge of the names on the list.

64720. Only after meeting all of the duties and conditions provided for in Section 64719, shall a first handler be required to pay assessments required in this article. However, the requirement to pay assessments shall only apply to each separate purchase of beef made by a first handler from an out-of-state beef processor subsequent to the name of the processor appearing on the list, and that requirement shall continue only until such time as the out-of-state beef processor has remitted the past due assessments to the director. Nothing in this section shall be construed as requiring the first handler to pay any assessments owed by an out-of-state beef processor prior to the name of that processor being placed on the list.

64721. Out-of-state beef processors are primarily liable for the payment of assessments provided for in this article, and any first handler that pays the assessment for and on behalf of any out-of-state beef processor may deduct the assessment amount from any money which is owed by the first handler to the out-of-state beef processor on contracts entered into on or after January 1, 1982.

These deductions are hereby declared to be trust funds held by the first handler and shall be remitted to the director in a timely manner.

64722. There shall be a presumption affecting the burden of producing evidence pursuant to Section 604 of the Evidence Code that any out-of-state beef processor who causes beef to be received in this state is subject to the provisions of this chapter, including the payment of assessments provided for in this article.

64723. This article shall remain in effect only until January 1, 1986, and as of that date is repealed unless

a later enacted statute, which is chaptered before January 1, 1986, deletes or extends that date.

SEC. 8. If any provision of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

SEC. 10. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

The current depressed conditions of the beef cattle industry, caused in part by consumer misconceptions regarding the role of red meat and animal fats in a basic diet, are threatening the economic stability of the industry. Thus, in order to correct this situation through a program of research, education and promotion, it is necesary that this act take effect immediately.

Assembly Bill No. 2631

CHAPTER 370

An act to amend Sections 64691 and 64713 of, to add Sections 64691.1, 64692, and 64714 to and to repeal and add Sections 64691.7, 64712, and 64715 to, the Food and Agricultural Code, relating to agriculture, and declaring the urgency thereof, to take effect immediately:

[Approved by Governor July 2, 1982. Filed with Secretary of State July 2, 1982.]

LEGISLATIVE COUNSEL'S DIGEST

AB 2631, N. Waters. California Beef Council: assessments.

(1) Under existing law, in order to support the California Beef Council, a fee of $1 per head on cattle and calves which are sold in this state is charged and collected from the seller or from the seller's account and paid to the Director of Food and Agriculture by each operator of any stockyard, livestock, auction market, slaughterhouse, packing plant, feedlot, or by the seller's agent. The fee is not charged on specified cattle including any cattle which are less than 3 months of age. The law also excludes any cattle slaughtered at a licensed slaughter plant from the $1 fee, but subjects the beef from these cattle to an equivalent fee on the chilled carcass weight.

This bill would delete the exclusion on cattle slaughteed at a licensed slaughter plant, thereby subjecting these cattle to the $1 fee, and would repeal the equivalent assessment provisions. The bill would also modify the exclusion on cattle less than 3 months of age by instead excluding cattle which are less than 300 pounds, and would add an exclusion for cattle which are custom slaughtered, as specified.

(2) Existing law does not require persons who collect the $1 beef council fee or out-of-state beef processors who register with the Department of Food and Agriculture and pay a prescribed assessment on beef shipped into this state to maintain specified records.

This bill would require these persons to maintain a complete and accurate record of all transactions, as prescribed.

(3) Existing law requires out-of-state beef processors to pay prescribed assessments on beef shipped into this state.

This bill would reduce the amount of those assessments and would provide that these processors shall not be required to pay an amount in excess of the equivalent of $1 per head on the beef shipped.

(4) Article XIII B of the California Constitution and Sections 2231 and 2234 of the Revenue and Taxation Code require the state to reimburse local agencies and school districts for certain costs mandated by the state. Other provisions require the Department of Finance to review statutes disclaiming these costs and provide, in certain cases, for making claims to the State Board of Control for reimbursement.

However, this bill would provide that no appropriation is made and no reimbursement is required by this act for a specified reason.

(5) The bill would take effect immediately as an urgency statute.

The people of the State of California do enact as follows:

SECTION 1. Section 64691 of the Food and Agricultural Code is amended to read:

64691. In order to carry out the programs and administer the activities which are conducted pursuant to this chapter, except as specified in Section 64691.5, a fee of one dollar ($1) per head on cattle and calves, except cattle or calves shipped into a California registered feedlot from out of state, shall be charged and collected from the seller or from the seller's account and paid to the director as specified in Section 64691.7 by each operator of any stockyard, livestock auction market, slaughterhouse, packing plant, feedlot, or seller's agent, who shall deduct that amount from the proceeds of sale or from other moneys owed to the seller. The fee shall be charged on all cattle and calves, except the following:

(a) Hides, skins, or reduction animals.

(b) Any cattle that are transported for purposes other than for sale of slaughter and without a change of ownership.

(c) Any animal which is less than three hundred pounds.

(d) Any animal sold for milk or calf production.

(e) Any cattle custom slaughtered exclusively for the owner, members of the owner's household, or the owner's nonpaying guests or employees.

The fees shall not be charged or collected more than once from each owner upon the same animal.

SEC. 2. Section 64691.1 is added to the Food and Agricultural Code, to read:

64691.1. Each person who is required to collect the fees which are required in Section 64691 shall maintain a complete and accurate record of all transactions subject to fees under this chapter. These records shall contain such information as required by the director relating to the collection of fees, shall be preserved for a period of two years, and

shall be offered and submitted for inspection and audit at any reasonable time upon written demand by the director or his or her duly authorized agent.

All information obtained by the director or his or her duly authorized agent from any inspection or audit of records shall be confidential and shall not be disclosed except when required in a judicial proceeding.

SEC. 3. Section 64691.7 of the Food and Agricultural Code is repealed.

SEC. 4. Section 64691.7 is added to the Food and Agricultural Code, to read:

64691.7. The fees required under Section 64691 shall be due and payable as follows:

(a) The fees for cattle slaughtered at a slaughterhouse which are received from a registered feedlot shall be remitted to the director by the slaughterer on forms provided by the director.

(b) The fees for cattle shipped from a registered feedlot in this state to a location outside this state for slaughter shall be paid to the brand inspector at the time of inspection prior to shipment from this state.

(c) The fees for all cattle not otherwise provided for in subdivisions (a) and (b) of this section shall be collected at the same time that brand inspection fees are collected.

SEC. 5. Section 64692 is added to the Food and Agricultural Code, to read:

64692. The fee which is required by Section 64691 shall be paid for each head of cattle which is slaughtered in the state unless it is specifically excepted by Section 64691. If the fee is not otherwise deducted from the seller as provided in Section 64691, it shall be paid by the purchaser or slaughterer and is due and payable in the manner provided in Section 64691.7.

SEC. 6. Section 64712 of the Food and Agricultural Code is repealed.

SEC. 7. Section 64712 is added to the Food and Agricultural Code, to read:

64712. For the purposes of this article, the term "beef" includes boxed beef and boned beef in fresh or frozen form and all forms of carcass beef or portions thereof not included under boxed beef and boned beef.

SEC. 8. Section 64713 of the Food and Agricultural Code is amended to read:

64713. In order to carry out the programs and administer the activities which are conducted pursuant to this chapter, an assessment of $0.0015 per pound based on chilled carcass weight or $0.00175 per pound on boxed beef or $0.00242 per pound on boned beef shall be collected from every out-of-state beef processor. However, persons subject to this assessment shall not be required to pay an amount in excess of the equivalent of one dollar ($1) per head. Any person who pays an assessment in excess of the equivalent of one dollar ($1) per head shall be entitled to a refund of the excess portion of the payment as long as the person demonstrates to the statisfaction of the director or his or her agent that a refund is warranted. The assessment provided in this section is intended to be the equivalent of the fee provided in Section 64691.

SEC. 9. Section 64714 is added to the Food and Agricultural Code, to read:

64714. Payment of assessments provided for under this article shall be made directly to the department, together with copies of each sales transaction of beef shipped into California. Collections under this section shall be made by the department under regulations promulgated by the director.

SEC. 10. Section 64715 of the Food and Agricultural Code is repealed.

SEC. 11. Section 64717.5 is added to the Food and Agricultural Code, to read:

64717.5 Each registrant shall maintain a complete and accurate record of all transactions subject to assessments under this chapter. These records shall contain such information as required by the director relating to the collection of assessments, shall be preserved by the registrant for a period of two years, and shall be offered and submitted for inspection and audit at any reasonable time upon written demand by the director or his or her duly authorized agent.

All information obtained by the director or his or her duly authorized agent from any inspection or audit of records shall be confidential and shall not be disclosed except when required in a judicial proceeding.

SEC. 12. No appropriation is made and no reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution or Section 2231 or 2234 of the Revenue and Taxation Code because the only costs which may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, changes the definition of a crime or infraction, changes the penalty for a crime or infraction, or eliminates a crime or infraction.

SEC. 13. This is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

Due to the need to administer the program of California Beef Council assessments in a manner consistent with related federal requirements, it is necessary that this act take effect immediately.